

A **Tenaga Pharmed Sdn Bhd v Public Prosecutor and other applications**

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NOS 41-197-92, 41-198-92, 41-199-92 AND 41-335-92

B MOHD HISHAMUDIN JC
1 MARCH 1994

C **Criminal Law** — *False trade descriptions* — *Appellant charged with offence under s 3(1)(b) of the Trade Descriptions Act 1972* — *Appellants indicated on labels that they were manufacturers of the drugs although they did not make drugs* — *Appellants had packed and labelled the bottles* — *Whether they were manufacturers* — *Trade Descriptions Act 1972 s 3(1)(b)*

D **Criminal Procedure** — *Trial* — *Onus of proof* — *False trade descriptions* — *Section 4(4) of the Trade Descriptions Act 1972 created an exception under s 3 of the Trade Descriptions Act 1972* — *Onus on defence to prove on a balance of probabilities that their act or activity came within the exception* — *Necessary requirements of s 4(4) of the Trade Descriptions Act 1972* — *Trade Descriptions Act 1972 ss 3 & 4(4)* — *Evidence Act 1950 s 105*

E **Words and Phrases** — *'Manufacturers'* — *Control of Drugs and Cosmetics Regulations 1984 reg 2*

Words and Phrases — *'Trade description'* — *Trade Descriptions Act 1972 s 4(1)*

F The appellants were charged for an offence under s 3(1)(b) of the Trade Descriptions Act 1972 ('the TDA') for indicating on the labels of certain drugs that certain companies ('the companies') were the manufacturer of the drug. At the commencement of the trial before the magistrate, counsel for the appellants made a preliminary objection, submitting that the charges disclosed no offence. They argued that there was no misdescription in indicating on the labels of the containers that the companies were the manufacturers of the drugs, as although they did not make the drugs, they did pack the drugs and label the bottles, and according to the definition under reg 2 of the Control of Drugs and Cosmetics Regulations 1984 ('the Regulations'), they were the 'manufacturers' of the drugs. Counsel further argued that, even assuming that there had been a misdescription, nevertheless, no offence had been committed by reason of s 4(4) of the TDA, as s 4(4) protects the appellants from prosecution. They submitted that this section deems such acts of the appellants as not to be acts of false description. The magistrate overruled the preliminary objection, but allowed a stay of proceeding pending appeal.

I **Held**, dismissing the appeal:

- (1) There was no evidence that the companies had packed the drugs into the containers and had labelled the containers. Even assuming that the companies had carried out those activities, the appellants

- still could not claim that the companies were the manufacturers of the drugs, as they did not make the drugs. A company that merely packed the ready-made drugs into containers and thereafter labelled the containers should be described on the label of the bottles as the person who packed and labelled the drugs. It would be a false description to describe such a company as the 'manufacturer'. It makes no difference that the definition of 'manufacture' in the Regulations includes packing and labelling. The appellants were not entitled to rely on that definition for the purpose of the TDA as that definition was only for the purposes of the Regulations and was irrelevant for the purposes of the TDA. A
- (2) The court rejected counsel for the appellants' contention that no offence had been committed by reason of s 4(4) of the TDA, as s 4(4) protected the appellants from prosecution. B
- (3) Section 4(4) creates an exception to the prohibition under s 3 of the TDA and it renders any application of false trade description permissible by deeming it not to be a false trade description provided certain conditions were satisfied. Therefore, by virtue of s 105 of the Evidence Act 1950, the onus was on the defence to adduce evidence to prove, on a balance of probabilities, that the act or activity of the appellants came within the exception. If so, such a point should be taken up by the defence only during the submission after the defence had closed its case, and perhaps, in exceptional cases, during the submission of no case to answer at the close of the case for the prosecution. C
- (4) In order to comply with the requirements of s 4(4), three limbs of the provision must be satisfied. First, that such a trade description as applied to the drugs in question, that is to say, naming the manufacturer of the drug, was prohibited by the Sale of Drugs Act 1952 ('the SDA') except in cases where the trade description was applied to drugs which complied with the requirements of the SDA; secondly, the drugs in question did comply with the requirements of the SDA; and thirdly, the trade description, as applied to the drugs in the present case, was applied in accordance with the requirements of the SDA. Here, there was nothing in the SDA or the Regulations which prohibits the application of any trade description on the container of the drugs indicating or naming the manufacturer of the drugs. D
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[Bahasa Malaysia summary

Perayu telah dituduh untuk suatu kesalahan di bawah s 3(1)(b) Akta Perihal Dagangan 1972 ('APD itu') kerana telah menyatakan atas label ubat tertentu bahawa beberapa buah syarikat ('syarikat itu') merupakan pengilang ubat itu. Pada permulaan tindakan itu di hadapan majistret, peguambela untuk pihak perayu telah membuat suatu bantahan permulaan, dengan menyatakan bahawa tuduhan itu tidak mendedahkan sebarang kesalahan. Mereka telah berhujah bahawa I

- A tidak terdapat salah perihal apabila perayu menyatakan pada label bekas ubat itu bahawa syarikat itu merupakan pengilang ubat itu, kerana walaupun mereka tidak membuat ubat itu, mereka telah memasukkan ubat itu ke dalam botol itu dan melabelkannya, dan menurut pentakrifan di bawah peraturan 2 Peraturan-Peraturan Kawalan Dadah dan Kosmetik 1984 ('Peraturan itu'), mereka
- B merupakan 'pengilang' ubat itu. Peguambela seterusnya berhujah bahawa, walaupun boleh dianggap bahawa terdapat suatu salah perihal, tetapi, tidak terdapat kesalahan yang telah dilakukan disebabkan s 4(4) APD itu, kerana s 4(4) melindungi perayu daripada didakwa. Mereka berhujah bahawa seksyen ini tidak menganggap perbuatan perayu sebagai perbuatan perihal dagangan palsu. Majistret telah menolak bantahan permulaan itu, tetapi telah membenarkan supaya prosiding digantung sementara menunggu rayuan ini dibuat.
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Diputuskan, menolak rayuan itu:

- D (1) Tidak terdapat bukti yang menunjukkan bahawa syarikat itu telah memasukkan ubat itu ke dalam botol dan telah melabelkan botol itu. Seandainya syarikat itu telah menjalankan aktiviti tersebut, perayu masih tidak boleh mendakwa bahawa syarikat itu merupakan pengilang ubat itu, kerana mereka tidak membuat ubat itu. Sebuah syarikat yang hanya memasukkan ubat yang sedia dibuat ke dalam botol dan kemudiannya melabelkan botol itu sepatutnya disifatkan pada label botol itu sebagai orang yang telah membotol dan melabelkan ubat itu. Ia merupakan suatu perihal palsu untuk menyifatkan syarikat seperti itu sebagai 'pengilang'. Adalah tidak penting bahawa pentakrifan 'pengilang' di dalam Peraturan itu termasuk pembungkusan dan meletakkan label. Perau tidak berhak bergantung kepada pentakrifan itu bagi tujuan APD itu kerana pentakrifan itu hanyalah bagi tujuan Peraturan itu dan adalah tidak relevan bagi tujuan APD.
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- F (2) Mahkamah telah menolak hujahan peguambela perayu bahawa tidak terdapat kesalahan yang telah dilakukan disebabkan s 4(4) APD itu, kerana s 4(4) melindungi perayu daripada didakwa.
- G (3) Seksyen 4(4) mewujudkan suatu pengecualian di bawah s 3 APD itu dan ia membenarkan sebarang penggunaan perihal dagangan palsu dengan menyifatnya sebagai tidak merupakan suatu perihal dagangan palsu jika beberapa syarat dipenuhi. Oleh itu, memandangkan s 105 Akta Keterangan 1950, beban terletak pada pihak pembela untuk mengemukakan keterangan untuk membuktikan, atas imbangkan kebarangkalian bahawa, perbuatan atau aktiviti perayu jatuh di bawah pengecualian itu. Jika demikian, perkara ini hanya sepatutnya dihujahkan oleh pihak pembela semasa penghujahan selepas pihak pembela telah menutup kesnya, dan mungkin, dalam kes yang luar biasa, semasa penghujahan tidak ada kes untuk dijawab pada penghujung kes pihak pendakwa.
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- I (4) Untuk memenuhi keperluan s 4(4), tiga cabang peruntukan itu mesti dipatuhi. Pertama, bahawa perihal dagangan yang digunakan untuk ubat itu, iaitu, menamakan pengilang ubat itu, dilarang

oleh Akta Jualan Dadah 1952 ('AJD itu') kecuali di dalam kes di mana perihal dagangan itu digunakan untuk ubat yang mematuhi keperluan AJD itu; kedua, ubat itu mesti mematuhi keperluan AJD itu; dan ketiga, perihal dagangan itu, sebagaimana yang telah digunakan untuk ubat di dalam kes ini, digunakan mengikut keperluan AJD itu. Di dalam kes ini, tidak terdapat apa-apa di dalam AJD itu atau Peraturan itu yang melarang penggunaan sebarang perihal dagangan pada botol ubat yang menyatakan atau menamakan pengilang ubat itu.]

[*Editorial Note*: The appellants in Criminal Appeal No 41-199-92 have made a reference to the Supreme Court.]

Notes

For cases on the construction of the word 'manufacture', see *Malayan Law Journal Words and Phrases Judicially Defined* (1990) at pp 336-337.

For a case on an offence under s 3(1)(b) of the Trade Descriptions Act 1972, see [1991] *Mallal's Digest* 869.

For a cases on the onus of proof in a criminal trial, see 5 *Mallal's Digest* paras 2731-2734.

Cases referred to

- 1 *PP v Tan Kim Lim* [1975] 1 MLJ 215 (refd)
- 2 *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 (refd)
- 3 *Thompson v Goold & Co* [1910] AC 409 (refd)
- 4 *Vickers, Sons and Maxim Ltd v Evans* [1910] AC 444 (refd)
- 5 *N Govindasamy v PP* [1976] 2 MLJ 49 (refd)

Legislation referred to

Trade Descriptions Act 1972 ss 3(1)(b), 4(1), (4)

Control of Drugs and Cosmetics Regulations 1984 reg 2

PC Choong (Choong & Co) for the appellant in Criminal Appeal Nos 41-197-92 and 41-198-92.

Jeffrey Fernandez (Koo Chin Nam with him) (Koo Chin Nam & Co) for the appellant in Criminal Appeal No 41-199-92.

Harjeet Singh (Shearn Delamore & Co) for the appellant in Criminal Appeal No 41-335-92.

Zainal Abidin (Deputy Public Prosecutor) for the respondent.

Mohd Hishamudin JC: All these four appeals were, by consent, heard together on 7 December 1993. They were heard together as a matter of convenience since the issue for the determination by the court was common to all the four cases. In dismissing the appeal, I informed the parties that in view of the issue raised, I would give a written judgment.

Each of the appellants was charged before the Magistrates' Court of Petaling Jaya for an offence under s 3(1)(b) of the Trade Descriptions Act 1972 (hereinafter referred to as 'the TDA'). In Appeal No 1 (Criminal

- A Appeal No 41-197-92), the appellant, Tenaga Pharmed Sdn Bhd was charged as follows:

B That you on 25 September 1986 between 2.45pm to 3.05pm at Makmal Ubat dan Setor Kementerian Kesihatan Jalan Universiti Petaling Jaya in the district of Petaling Jaya in the state of Selangor Darul Ehsan, in the course of business did supply to Kementerian Kesihatan Malaysia 29,977 ampoule injection promethazine hydrochloride BP 25 mg/ml ampoule, to which a false trade description has been applied, namely, the description 'Malayan Pharmaceutical Factory, Petaling Jaya' was indicated on the label of the bottles containing the said ampoules which was an indication or likely to be taken as an indication that the said company is the manufacturer when in fact the said company is not the manufacturer, and that you have thereby committed an offence under s 3(1)(b) of the Trade Descriptions Act 1972 and punishable under s 18(2) of the same Act (Act 87).

In Appeal No 2 (Criminal Appeal No 41-198-92), the appellant (also the same company) was charged as follows:

D That you on 17 September 1986 between 3pm to 4pm at Makmal Ubat dan Setor Kementerian Kesihatan Jalan Universiti Petaling Jaya in the district of Petaling Jaya in the state of Selangor Darul Ehsan, in the course of business did supply to Kementerian Kesihatan Malaysia 2,500 bottles @ 1,000 tablets erythromycin stearate, to which a false trade description has been applied, namely, the description 'Hor Yan Hor Pharmaceuticals Sdn Bhd, 12 Jalan Kuala Kangsar, Ipoh, Perak' was indicated on the label of the bottles containing the said erythromycin stearate which was an indication or likely to be taken as an indication that the said company is the manufacturer when in fact the said company is not the manufacturer, and that you have thereby committed an offence under s 3(1)(b) of the Trade Descriptions Act 1972 and punishable under s 18(2) of the same Act (Act 87).

F In Appeal No 3 (Criminal Appeal No 41-199-92), the appellant, Duopharma (M) Sdn Bhd, was charged for abetting Tenaga Pharmed Sdn Bhd in the commission of the offence, and in Appeal No 4 (Criminal Appeal No 41-335-92), the appellant, Malayan Pharmaceutical Factory Sdn Bhd, was charged for abetting the same company, Tenaga Pharmed Sdn Bhd, in the commission of the offence.

G Section 3(1)(b) of the TDA states:

Prohibition of false trade descriptions

(1) Any person who, in the course of trade or business —

H ...
(b) supplies or offers to supply any goods to which a false trade description is applied,

shall be guilty of an offence.

I At the commencement of the trial before the learned magistrate, learned counsel for the appellants made a preliminary objection as to the charges. He submitted that the charges disclosed no offence. He argued that there was no misdescription in indicating on the labels of the containers (ie the bottles) that the companies (Malayan Pharmaceutical Factory, Petaling Jaya and Hor Yan Hor Pharmaceuticals Sdn Bhd), named in the charges,

were the manufacturers of the drugs. He contended that, although these companies did not make the drugs, nevertheless, they did pack the drugs (ie put the drugs in bottle containers) and label the bottles, and according to the definition under reg 2 of the Control of Drugs and Cosmetics Regulations 1984 (PU(A)223/1084) (hereinafter referred to as 'the Regulations'), they were the 'manufacturers' of the drugs. Regulation 2 of the Regulations defines 'manufacture' as follows:

'manufacture', in relation to any product includes —

- (a) the making or assembling of the product;
- (b) *the enclosing or packing of the product in any container in a form suitable for administration or application, and the labelling of the container;* and
- (c) the carrying out of any process in the course of any of the foregoing activities; ... (Emphasis added.)

Learned counsel further argued that, even assuming that there had been a misdescription, nevertheless, no offence had been committed by reason of s 4(4) of the TDA. He contended that s 4(4) of the TDA protects the appellants from prosecution. He submitted that this section deems such acts of the appellants as *not* to be acts of false description. Section 4(4) of the TDA reads:

Where the application of any description is prohibited under the provisions of any of the laws specified in the First Schedule except where applied to goods which comply with the requirements of that law no such description applied in accordance with the requirements of that law shall be a false trade description; and the Minister may by order add to, delete from, amend or modify the First Schedule.

To date, the only law specified in the First Schedule is the parent Act of the above Regulations, that is, the Sale of Drugs Act 1952 (Rev 1989) (Act 36) (hereinafter referred to as 'the SDA'). Learned counsel submitted that, by virtue of the above s 4(4) of the TDA, which expressly links the SDA as well as the Regulations to the TDA, the trade description as applied by the appellants to the drugs, even assuming that it was false to a material degree — since the companies named on the labels did not make the drugs (but only packed the drugs into containers and labelled the containers) — nevertheless, legally, is not a false description so long as:

- (a) the drugs; and
- (b) the packing of the drugs and the labelling of the containers,

were in conformity with the SGA and the Regulations.

The learned magistrate did not make any ruling as to the first contention. However, as regards the second (and alternative) contention, the learned magistrate referred to the following clause (or rather the first limb) of s 4(4) of the TDA: '*Where the application of any description is prohibited under the provisions of any of the laws specified in the First Schedule ...*' and ruled that what this clause means is that for this section to be applicable it must be ascertained, first of all, whether the SDA and the Regulations prohibit the application of the trade description to the drugs; and she came to the conclusion that the SDA and the Regulations do not prohibit the application

- A of such trade description; and since the SDA and the Regulations do not prohibit the application of such trade description, therefore, s 4(4) was not applicable.

Accordingly, she overruled the preliminary objection, but allowed a stay of proceeding pending appeal.

- B I rejected arguments of learned counsel. As to the first point raised, there was no evidence that the companies concerned had packed the drugs into the containers (ie the bottles) and had labelled the containers. Indeed, how could there be such evidence when the point was prematurely taken up by way of preliminary object *before* the trial. However, even assuming that the companies had carried out these activities in relation to the drugs, the appellants still could not claim that these companies were the manufacturers of the drugs. For the companies did not *make* the drugs. The words 'manufacturer' or 'manufacture' is not defined in the TDA. However, *Chambers Concise 20th Century Dictionary* defines 'manufacture' as: '... to make, originally by hand, now usu. by machinery and on a large scale; making of articles by physical labour or machinery, esp on a large scale; ...'
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- D The *Concise Oxford Dictionary* defines 'manufacture' as: 'Making of articles by physical labour or machiner, esp on a large scale.'

In *PP v Tan Kim Lim*¹ Syed Othman J (as he then was) ruled (at pp 216–217):

- E Considering the authorities, the word 'manufacture' appears to me to mean in its general sense the making by labour or machine of an object or various objects into another object of a different character. Thus if a slab of granite is carved into a grindstone, a piece of wood is made into a piece of furniture, or a lump of earth into a brick, it is manufacture. Similarly, if transistors, condensers, resistors and pieces of wire are put together into a box so as to convert them into a radio or a television set, or if pieces of shaped iron sheets, rubber, glass, fabrics and other materials are assembled and turned into a vehicle it is 'manufacture'.
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- On the basis of the above authorities, it is clear that even assuming that the appellants were in a position to adduce evidence that the companies named on the labels had packed the drugs into bottles and had labelled the bottles, they were not entitled to describe those companies as the 'manufacturers' of the drugs: the manufacturers of the drugs were the companies (whoever they might be) that *made* the drugs. A company that merely packed the ready-made drugs into containers and thereafter labelled the containers should be described on the label of the bottles as the person who packed and labelled the drugs. It would be a false description to describe such a company as the 'manufacturer'. It makes no difference that the definition of 'manufacture' in the Regulations includes packing and labelling. It is my view that the appellants were not entitled to rely on that definition for the purpose of the TDA: that definition is only for the purposes of the Regulations and is irrelevant for the purposes of the TDA.
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- I On the second (alternative) argument, at the hearing of these appeals, it was further argued on behalf of the appellants that it was the intention of the legislature in enacting s 4(4) of the TDA to permit local suppliers of such drugs, who comply with the SDA and the Regulations, to call themselves the 'manufacturer' of the drugs, even though they are not the makers of the drugs (but merely packed and labelled them) since (to quote Encik

Fernandez), 'Parliament intended to cultivate the pharmaceutical industry in this country and appreciates the fact that we are a developing country and that, at the present moment, the local companies have neither the resources nor attained the standard of technology so as to be in a position to make such drugs'.

Learned counsel tried hard to persuade me to accept his interpretation of s 4(4) of the TDA and his understanding of the rationale of that provision. With respect, I am not prepared to do so. Unless the TDA and the SDA themselves are clear as to the policy consideration in enacting s 4(4) — and with all humility I would say that it is wholly unclear — I am not prepared to accept the interpretation and the rationale as proposed by learned counsel; for to do so would be to transgress into the realm of conjecture and speculation, if not to usurp the function of the legislature. I am reminded of what Abdoolcader SCJ said in *Vengadasalam v Khor Soon Weng & Ors*² at p 450:

It would appear to us that the learned judge has in fact by his determination in this matter purported to inject policy considerations in his construction of the requisite provisions of the Act in the face of its textual connotation. This would be taking statutory construction beyond its permissible limits, and we would refer to what has been said in this regard in *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356 at p 358.

In this regard, I also wish to advert to the judgment of the House of Lords in *Thompson v Gould & Co*³ where Lord Mersey said (at p 420): 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of a clear necessity it is a wrong thing to do.'

Even more pertinent perhaps would be the salutary reminder of Lord Loreborn LC in *Vickers, Sons and Maxim Ltd v Evans*⁴ when he said (at p 445):

My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; ...

The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

In rejecting learned counsel's argument, I must, however, confess that I encountered great difficulty in interpreting s 4(4). It is a vague provision. Attempting to interpret and to ascertain the meaning of such phrases as 'the application of any description', 'goods which comply with the requirements of that law' and 'description applied in accordance with the requirements of that law' is an exasperating experience. Indeed, it is a near impossible task. With the greatest respect to those responsible for its drafting, the provision appears to me to have been rather loosely drafted. I believe — if I may be permitted to suggest — that it would be a good idea if the learned deputy public prosecutor could consider bringing to the attention of the legal advisers of the relevant Ministries and the Attorney General's Department

A of the need to re-examine the provision of s 4(4) of the TDA with the view to simplifying the drafting of this provision so that the objective of the provision, whatever it may be, could be achieved.

However, be that as it may, there is a pertinent issue which should have been addressed to (but was not) by the parties in their submissions before the learned magistrate. This issue was also glossed over during the arguments at the hearing of these appeals. The issue is this. As a matter of law, was it the duty of the prosecution, in order to prove a prima facie case against the defendants, to prove that s 4(4) was not applicable? Or was the legal burden placed on the defence to prove that that provision was applicable? In my view — and it is important to appreciate this fact — s 4(4) creates an exception to the prohibition under s 3 of the TDA. Section 4(4) renders any application of false ('false' in the sense as stipulated by s 5 of the TDA) trade description permissible by deeming it not to be a false trade description provided certain conditions, as stipulated under that section, are satisfied. This being the case, by virtue of s 105 of the Evidence Act 1950, the onus was on the defence to adduce evidence to prove (and not for the prosecution to prove otherwise) that the act or activity of the appellants came within the exception. And as to the standard of proof, it was incumbent upon the defence to prove on a balance of probabilities (*N Govindasamy v PP*⁵).

Now, if the burden was on the defence to adduce evidence to prove on a balance of probabilities that the act or activity of the appellants fell squarely within the exception as provided for by s 4(4), I am rather perplexed as to how it was possible for the defence to have raised such an issue (that the charges disclosed no offence by virtue of s 4(4) of the TDA) as a preliminary objection *before* any evidence had been adduced by either side! Normally, in such a case as the present, such a point would be taken up by the defence only during the submission after the defence has closed its case, and, perhaps, in exceptional cases, the point may also be taken up by the defence during the submission of no case to answer at the close of the case for the prosecution, if the defence is of the view that the evidence emerging from the testimonies of the prosecution's witnesses, during cross-examination, discloses that the case falls under an exception which exonerates the defendant.

At the hearing of these appeals, when I posed to learned counsel the issue of burden of proof, the brief and simple reply was that, for the purpose of the preliminary objection, there was no necessity for any evidence to be adduced by either party since the prosecuting officer at the hearing before the learned magistrate had conceded that there was no misdescription under the Regulations and that the appellants had complied with the requirements under the Regulations. I quote what learned counsel, Encik Jeffrey Fernandez, had actually said:

I Under reg 2 (of the Regulations), the word 'manufacture' is defined. It is clear that packaging and labelling fall within the definition of 'manufacture'. Therefore, there had been no misdescription under these Regulations of 1984. The prosecuting officer conceded on this point. See p 40 of the appeal record at para 4 (of the written submission of the prosecuting officer). The prosecution conceded that the subject matter of this case complied with the requirements under the Regulations of 1984.

Now, para 4 of the written submissions of the prosecuting officer reads:

Adalah diakui bahawa pelabelan terhadap barangan yang menjadi 'subject matter' di dalam kes ini dibuat sebagai mematuhi kehendak-kehendak di dalam Peraturan-Peraturan Kawalan Dadah dan Kosmetik 1984. Walau bagaimanapun, isu-isu berikut turut juga menjadi persoalan:

- (a) sama ada defendan sendiri atau syarikat yang telah dicatatkan sebagai pembuat pada label barangan di dalam kes ini boleh dipanggil 'pembuat' ('manufacturer') berdasarkan definisi di dalam Peraturan-Peraturan tersebut;
- (b) sama ada di dalam melabelkan barang-barang berkenaan telah berlaku salah perihal (misdescription) oleh defendan;
- (c) sama ada perbuatan salah perihal tersebut (jika ada) dilarang oleh atau menjadi suatu kesalahan di bawah Akta Jualan Dadah 1952 serta peraturan-peraturan yang dibuat di bawahnya.

It is to be noted that what was conceded by the prosecuting officer was only that the 'labelling' of the drugs was in accordance with the Regulations. Therefore, it is clear that learned counsel, by claiming that the prosecution conceded that the subject matter of this case complies with the requirements under the Regulations, had overstretched the concession made by the prosecution. Nowhere in his written submission did the prosecuting officer state that the *drugs* (ie the 'subject matter' of the case) comply with the requirements of the Regulations. He merely stated that the *labelling* was in compliance with the Regulations. It follows therefore that, contrary to the claim made by Encik Fernandez, there had been no unequivocal and complete concession made by the prosecuting officer to the defence so as to satisfy the court that all the necessary requirements under s 4(4) of the TDA had been met.

What are the necessary requirements of s 4(4)? In my opinion, in order to comply with the requirements of s 4(4), the following three limbs of the provision must be satisfied:

First, '*Where the application of any description is prohibited under the provisions of any of the laws specified in the First Schedule ...*'.

Secondly, '*... except where applied to goods which comply with the requirements of that law ...*'.

Thirdly, '*... such description applied in accordance with the requirements of that law ...*'.

Bearing in mind what I have lamented above regarding the difficulty in interpreting s 4(4), what all this means, in the context of the charges, is that, the onus was on the defence to show:

First, that such a trade description as applied to the drugs in question, that is to say, naming the *manufacturer* of the drug, as what the appellants had done in the present case, was prohibited by the SDA except in cases where the trade description was applied to drugs which complied with the requirements of the SDA; *secondly*, that the drugs in question did comply with the requirements of the SDA; and *thirdly*, that the trade description, as applied to the drugs in the present case (ie naming the manufacturer) by the appellants, was applied in accordance with the requirements of the SDA.

Since the prosecution did not in clear terms concede that all the requirements as enumerated above were satisfied, I am unable to accept

- A learned counsel's contention that there was no necessity for the defence to adduce any evidence in order to rely on the exception provided for by s 4(4).

Now, it will be recalled that the learned counsel, in his submission, had suggested that all that was necessary, in order to seek the protection of s 4(4), was for the defence merely to show that the appellants had satisfied the requirements that:

- (a) the drugs; and
(b) the packing of the drugs and the labelling of the containers,

were in conformity with the SGA and the Regulations.

- C With respect, such a suggestion is too simplistic a view of the interpretation of s 4(4). To adopt that approach is to gloss over the first limb of that provision. I am of the view that in order for s 4(4) to be applicable, first of all, the court must be satisfied that the SDA and the Regulations prohibit 'the application of any description'. This means that, as a preliminary requirement, the court must be satisfied that the SDA and the Regulations prohibit any trade description on the labels naming the manufacturer of the drugs. This must be the interpretation to be given, for s 4(4) of the TDA must be read with s 4(1) of the TDA which defines 'trade description' as follows:

Trade description

- E (1) A trade description is an indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods or parts of goods, that is to say —

...

- (j) person by whom manufactured, produced, processed or reconditioned;

- F ...

In other words, in the light of s 4(1), the words 'any description' in s 4(4) must be interpreted to mean any trade description of the 'person by whom [the goods were] manufactured'.

- G I have scrutinized the SDA and the Regulations and I find nothing in the SDA or the Regulations which prohibits the application of any trade description on the container of the drugs indicating or naming the manufacturer of the drugs. If this first requirement itself could not be satisfied, then there is nothing further to inquire into.

- H Therefore, in conclusion, I must hold that the preliminary objection raised before the learned magistrate was misconceived and premature, and that the learned magistrate was right in law in overruling the preliminary objection.

Appeals dismissed.

Reported by Jeanne Tan